

National Association of County Veterans Service Officers



The Appeal Process

What Can You Appeal?

Any decision the VA makes

- **Except**

- **decisions on medical treatment**

- Like whether or not treatment is needed or what kind of treatment is needed

- **VA refusal to accept a debt repayment compromise offer**

3 Parts of an Appeal

- VA 21-0958 Notice of Disagreement (NOD)
- The VA's Statement of the Case (SOC)
- VA Form 9 "Substantive Appeal"

The Appeal Process

- The Regional Office's decision
- The claimant's 21-0958 NOD
 - Optional DRO Review – 60 day window
 - Optional Hearing – at any time
- The Regional Office's SOC
- The claimant's Form 9
- Maybe an SSOC
- Board of Veterans Appeals action

Where Do I Start?

- You have one year from the date of the VA's decision – the date on the “***Decision Notice***” – to file the NOD
- BUT, you have only 60 days if you want a Decision Review Officer to review the case
- Review the Rating Decision...
- Is the VA's decision correct?
- Perhaps there's really nothing to appeal

The VA 21-0958 Notice of Disagreement

- NOD starts the appeal process
- What do you disagree with?
- Why do you disagree?
- What did the VA do incorrectly
 - Procedures not followed
 - Regulations not applied correctly
 - Laws not applied
- Do you want a DRO review?
 - Not always something that's necessary

The NOD...

- This can get complicated
 - But this is where you earn your paycheck
- Here's the theory...
- Get a DRO to look at the claim
- If DRO won't grant based on your overwhelming logic and evidence
- Get the claim out of the RO –
File the Form 9 for the Appeal

Your first 'legal brief'

- Focus on the issues
- Be specific – cite procedures
- Focus on the issues
- Cite pertinent regulations
- Focus on the issues
- Cite pertinent laws
- Focus on the issues!
- This is your 'legal brief'

Here's the Theory Again...

- Get a DRO to look at the claim along with your NOD
- If the DRO won't grant based on your overwhelming logic and evidence
- Get the claim out of the RO –
File the Form 9 for the Appeal



**You win cases
with evidence,
not argument**

Evidence

- If you don't have what you need
- **GET MORE!**

NOD

- Don't wait to gather more evidence – usually
 - You don't want to miss the DRO window
- You can submit additional evidence later

What Happens Next?

Without a DRO Review

- The VA will provide a Statement of the Case
 - The S O C
- The SOC will restate the VA's decision
- You can still ask for a "Personal Hearing"

Now What

- You have the remainder of the one year from the date of the “Decision Notice” to file a VA Form 9 – Appeal to the Board of Veterans Appeals

OR...OR...OR...

- 60 days from the date of the SOC

What Happens Next?

With a DRO Review

A Decision Review Officer will review the entire claim
'de novo' review - a completely “new look” at the claim

- The DRO can ask for more evidence
- If asked, the DRO may hold an informal hearing with the claimant

The DRO will issue the Statement of the Case

DRO

- Can grant the benefit sought
- Can grant part of the benefit sought
- Can continue the rating or denial
- But – the DRO cannot lower the rating
 - Unless based on Clear and Unmistakable Error (CUE)
- and...you can still ask for a Personal Hearing

Back to 'Now What'

- You have the remainder of the one year from the date on the Decision Notice to file a VA Form 9 – Appeal to the Board of Veterans Appeals

OR...OR...OR...

- 60 days from the date of the SOC
- Note that the '60 days' applies if an SSOC was written; the one-year limit remains

The DRO Selection Form

...”we believe”...

If the claimant doesn't ask for a DRO review in the Notice of Disagreement

VA is obligated to ask the claimant if he/she wants a DRO review and will provide a selection form

and Finally...

- **The VA Form 9**
- **Appeal to the Board of Veterans Appeals**
- **Called the “substantive appeal”**
- **Must show how the RO made an error of fact or law – a ‘reason’ to appeal**

VA Form 9

- Restate your disagreement
- Restate your case
- Be specific
- Tell the BVA you've already told the RO why the claim should be granted
- Restate pertinent laws and regulations
- Basically a rewrite of your NOD...

What else can you do?

- VA Form 646
“Statement of Accredited Representative
in Appealed Case”
- MOST OF US CAN'T USE THIS FORM...
- A good NOD can help the DSO/NSO write
a good 646

But...

What else can you do?

You CAN write a letter to the VA stating the veteran's position on the appeal and using all the same information you used on the NOD and Form 9.

This allows you to put all the facts – as you see them – in one place

Makes it easier for the BVA to 'see' the facts

Have the veteran submit your letter as evidence supporting his/her claim.

What else can you do?

- In the time it takes the claim to get to the BVA for action
 - gather more evidence
 - medical exams
 - buddy statements
 - historical documents
- Continue to submit new evidence

How to submit evidence after you've filed the Form 9

Under H.R. 1627, the “Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012” . . .

How to submit evidence after you've filed the Form 9

...”such evidence shall be subject to initial review by the board”...

38USC 7105(e)(1)

...and, you must ‘request’ that this evidence be reviewed when you submit the evidence...

38USC 7105(e)(2)

So, anything you submit after the Form 9 will automatically go to the BVA and become part of the file...unless...

If, for some reason, you want the RO to look at the claim again . . .

“the claimant or claimant’s representative requests in writing that the agency of original jurisdiction initially review such evidence.”

Just write this: “If, after considering this new evidence in total with all evidence submitted, you cannot grant my claim, my appeal stands.”

(This gives the RO one more chance to grant the claim...)

How to submit evidence after you've filed the Form 9...confusion

But...

We don't know how the VA is going to write the 'regulations and procedures' for this change standby...

SSOC

If additional evidence was submitted with the Form 9 or the RO makes a 'partial grant', the RO will issue a Supplemental Statement of the Case (SSOC)

Continuation – veteran's appeal continues

Partial Grant – veteran wins; if award is satisfactory you've avoided the lengthy BVA process

Note: if the RO 'grants' the claim in full, it will write a new decision



We've briefly explained the appeals process

Let's review what actually happens

and some options you have

The Appeals “Process”

- The RO's decision
- The 21-0958 NOD
- The SOC
- The Form 9
- Maybe the SSOC
- The RO 'certifies' the claim to the BVA
 - The claim gets a 'docket number'
 - The claim goes to the BVA and is stored

The BVA Process...

- From storage, the claim is sent to a BVA Judge (there are 60 judges) (HR 1627...maybe)
- The Judge works the case by docket number
- The BVA notifies the claimant and the representative, if there is one, that it's going to review the case
- 90 days after notice, the Judge will start working the claim – a chance to submit more evidence...

Let's look at some options

BVA Hearings

Choices - - -

- no hearing
- Personal Hearing in Washington, DC
- Personal Hearing before a BVA “Travel Board”
- A Video-Conference Hearing

No Hearing

“Just decide my case on what’s in the file”

Personal Hearing in Washington, DC

- Claimant notified of hearing date
- Must appear before the Board in Washington, DC at his/her own expense
- This is usually the fastest way to get your case heard

Personal Hearing Before a Traveling Board

- Same process but “BVA Travel Board” comes to the RO and actually has a hearing with the claimant
- Must travel to the hearing location at his/her own expense

BVA Video-Conference Hearing

- **Same basic process**
- **Claimant travels to the local RO (normally) and sits in front of a camera and TV screen - BVA judge remains in Washington**
- **Travel is still at the claimant's expense**
- **This is the second fastest way to get a claim before the BVA**

If you don't 'win' at the BVA

- You have two options:
- 1 – take the claim to the Court of Appeals for Veterans Claims – CAVC
- 2 – ask the BVA to 'reconsider' its decision
 - This is called a “Motion to Reconsider” and must be accompanied with an explanation of why you think the BVA made an error of fact or law
 - The BVA does not have to honor a Motion for Reconsideration

...but sometimes...

- The evidence just isn't there
- There's just no claim
- Many times you won't win
- A new twist...
- Be prepared for the Veterans Service Organization – the POA - to tell the claimant it won't take the claim to the BVA

What about 'The Court'?

...briefly...

- Claims denied at the Board of Veterans Appeals
- **120 days** to appeal to The Court of Appeals for Veterans Claims
- There's a \$50.00 fee (can be waived)
- The Court can decline to hear the case

The Court

- VSO's are very selective in cases they will take to the Court
 - in some fashion their national headquarters usually decides
 - be prepared for them not to take your case

If the VSO won't take the case to the Court
the claimant can seek a private attorney

Can You Avoid Appealing?

Maybe... 1. Request “**Administrative Review**”
2. Request “**Reconsideration**”

(This is not a “Motion to Reconsider” that you’d use at the BVA)

Either of these actions keeps the claim with the Regional Office team that made the decision in the first place

An NOD immediately sends the claim to the “Appeals Section”

Avoid the Appeal

Request “Administrative Review”

On a 21-4138 just ask the Regional Office for an “Administrative Review” of the Rating Decision.

Tell them why – ‘why’ should they look again?

Tell them why the outcome would be different

They can tell you ‘no’

Avoid the Appeal

Request “Reconsideration”

On a 21-4138 just ask the Regional Office to reconsider their decision

Tell them why – ‘why’ should they look again?

Tell them why the outcome would be different

They can tell you ‘no’

...yes, these amount to the same thing using different words...

CAUTION

on Administrative Review and Reconsideration

...in either case

The “one year to appeal” stands, the time is NOT extended because of these actions

... Pay attention!